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July 31, 2002

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TWB-204
Washington, DC 20554

Re: Implementation of the Pay Telephone Reclassification and Compensation
Provisions of the Telecommunications Act of 1996
CC Docket No. 96-128

Dear Ms. Dortch:

Today, I and Teresa Marrero (by phone) met with Jon Stover and Lynn Milne of WCB to discuss the above-referenced proceeding. The attached charts, which were provided for the meeting, provided the basis of the discussion. In addition, AT&T used the information in the attachment to highlight its position that the Commission should not alter its determination that payphone true-up adjustments are to be made directly between the carrier and the PSP (with whom they have had a direct relationship) and that carrier overpayments may be deducted from future payments to PSP's.

One electronic copy of this Notice is being submitted to the Secretary of the FCC in accordance with Section 1.1206 of the Commission's rules.

Sincerely,

A handwritten signature in black ink, appearing to read "M Del Casino".

attachment
cc: J. Stover
L. Milne



Refunds Owed to IXC's for Overpayments Made to Independent Payphone Service Providers

AT&T Ex Parte Presentation to the FCC
June 13, 2001

IMPLEMENTATION OF PAY TELEPHONE
RECLASSIFICATION & COMPENSTION PROVISIONS
OF THE TELECOMMUNICATIONS ACT OF 1996
Dkt. No. 96-128

OVERVIEW OF APCC's RECENT *EX PARTES* ATTEMPTING TO ESCAPE OBLIGATIONS TO MAKE RETROACTIVE ADJUSTMENTS TO IXC

APCC filed *ex partes* on April 15, 2002, April 25, 2002, and May 23, 2002 claiming that the Commission should not obligate independent payphone service providers (“PSPs”) to refund overpayments made by IXCs between October 7, 1997 and April 21, 1999 (“*Intermediate Period*”).

Using layer upon layer of factual assumptions, APCC asserts that it was under compensated for subscriber 800 calls between June 1, 1992 and November 6, 1996 (“*Early Period*”) (APCC May 23, 2002 *ex parte*).

OVERVIEW OF APCC's RECENT *EX PARTE* ATTEMPTING TO ESCAPE OBLIGATIONS TO MAKE RETROACTIVE ADJUSTMENTS TO IXC (cont.)

According to APCC, even taking into account monies owed to IXCs for overpayments made during both the *Intermediate Period* and the November 7, 1996 to October 6, 1997 period ("*Interim Period*"), APCC still remains under compensated for the *Early Period*.

APCC mischaracterizes the relevant law and Commission determinations in asserting that as a matter of basic equity, independent PSPs should not be required to pay refunds to IXCs for the Intermediate Period.

D.C. CIRCUIT'S *MCI REMAND DECISION* FULLY SUPPORTS RETROACTIVE ADJUSTMENTS

- ◆ The D.C. Circuit held that the FCC's rationale for the \$0.284 rate for coinless payphone calls was "plainly inadequate" and remanded the decision back to the Commission. *MCI Telecommunications Corp. v. FCC*, 143 F.3d 606, 608 (*MCI Remand Decision*).
- ◆ D.C. Circuit decision not to vacate the \$0.284 rate was based on:

"the clear understanding that if and when on remand the Commission establishes a different rate for coinless payphone calls, the Commission may order payphone service providers to refund to their customers any excess charges for coinless calls collected pursuant to the current rate." *Id.*
- ◆ D.C. Circuit specifically noted that the Commission itself had acknowledged that "it has the authority to adjust the compensation rate retroactively 'should the equities so dictate.'" *MCI Remand Decision* at 608.

D.C. CIRCUIT'S *MCI REMAND DECISION* FULLY SUPPORTS RETROACTIVE ADJUSTMENTS (con't)

- Significantly, the Court also explained that the Commission also “has the authority to order refunds where overcompensation has occurred.” *Id.*
- The Court acknowledged that under the 1996 Telecommunications Act, the Commission is “require[d] . . . to take all actions necessary . . .” to promulgate regulations to ensure fair compensation to payphone service providers.” *Id.*

Thus, the D.C. Circuit believed that its decision not to vacate the existing \$0.284 rate would not unfairly prejudice IXCs that had been paying the higher rate, because they were entitled to receive refunds.

THE COMMISSOIN PROPERLY INTERPRETED THE *MCI REMAND DECISION* IN ORDERING RETROACTIVE ADJUSTMENTS

The Commission correctly acknowledged that the D.C. Court decided to remand, rather than vacate the \$0.284 rate because it recognized that the Commission may order payphone service providers to refund any excess charges. *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 2545, ¶ 195 (“*Third Report & Order*”).

In ordering refunds of overpayments, the Commission properly considered the impact that such refunds would have on payphone service providers (“PSPs”). The Commission found that:

- ◆ “IXCs may recover their overpayments to the PSPs at the same time as PSPs receive payments from the IXCs.” *Id.* ¶ 198.
- ◆ IXCs may deduct net overpayments (net of payments due for the *Intermediate* and *Interim Periods*).

REQUIRING REFUNDS OF OVERPAYMENTS FALLS WITHIN THE STATUTORY SCHEME

Section 276 authorizes the Commission to “take all actions necessary” to ensure fair compensation for payphone service.

The Commission recognized that § 276 “directed” it to “insure fair compensation” for payphone calls. *Third Report & Order* ¶ 195.

Retroactive adjustments for both the *Interim* and *Intermediate Periods* are lawful under the statute.

APCC's ARGUMENTS REGARDING THE *EARLY PERIOD* ARE LEGALLY IRRELEVANT

In arguing that the Commission take into account alleged under compensation to payphone providers for the *Early Period*, (June 1, 1992 – November 6, 1996), APCC ignores that § 276 states only that the Commission is obligated to implement its mandates *after* the *Early Period*

- ◆ Section 276(b)(1) states “within 9 months *after* February 8, 1996, the Commission shall take all actions necessary . . . to prescribe regulations that . . . establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed interstate call using their payphone.” 47 U.S.C. § 276(b)(1) (emphasis added).

APCC's ARGUMENTS REGARDING THE *EARLY PERIOD* ARE LEGALLY IRRELEVANT (con't)

The Commission's unchallenged conclusion that its regulations implementing Section 276 would *not* apply to periods before the effective date of its *Report & Order*, 11 FCC Rcd. 20541, ¶ 126, is still controlling.

Thus, APCC's position that Section 276 *requires* the Commission to take into account the four-year period *prior* to the enactment of Section 276 is implausible and unsupported by the statute or the Commission's subsequent interpretations.

APCC's ARGUMENTS REGARDING THE *EARLY PERIOD* ARE LEGALLY IRRELEVANT (con't)

APCC was never entitled to additional compensation for the *Early Period*.

- ◆ Section 226(e)(2) did not mandate compensation or create an entitlement to compensation for subscriber 800 calls made during the *Early Period*.
- ◆ Section 226(e)(2) stated only that the Commission “*consider* the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones.” 47 U.S.C. § 226(e)(2).

The D.C. Court recognized this point stating:

- ◆ “Section 226(e)(2) does not order the FCC to prescribe compensation for all the calls to which it refers, only to ‘consider the need’ to prescribe compensation.” *Florida Public Telecommunications Ass’n, Inc. v. FCC*, 54 F.3d 857 (D.C. Cir. 1995).

APCC MISCHARACTERIZES THE GENERAL REFUND STANDARDS SET FORTH IN PRIOR D.C. CIRCUIT DECISIONS

Courts have found that retroactive true-ups are warranted most when:

- ◆ a refund covers the period during which litigation over the rates occurred, so that the parties had full notice of possible rate changes;
- ◆ the need for the refund is a result of agency error which the courts correct on appeal.

See, e.g. Exxon Co. v. FERC, 182 F.3d 30 (D.C. Cir. 1999); *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098; *Public Serv. Co. of Colo. v. FERC*, 91 F.3d 1478 (D.C. Cir. 1996).

Under these standards, the Commission's order requiring refunds of overpayments for the *Interim* and *Intermediate Period* clearly is the proper remedy.

APCC MISCHARACTERIZES THE GENERAL REFUND STANDARDS SET FORTH IN PRIOR D.C. CIRCUIT DECISIONS (con't)

APCC relies on cases that did not involve a legal error by an agency setting or approving rates.

- ◆ the majority of APCC's cases dealt with errors of private parties, for example tariff violations. (*See, e.g., Las Cruces TV Cable v. FCC*, 645 F.2d 1041 (D.C. Cir. 1981); *Wisconsin Elec. Power Co. v. FERC*, 602 F.2d 452 (D.C. CIR. 1978); *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810 (D.C. Cir. 1998)).
- ◆ the rest of the cases on which APCC relies did not involve rates that were found to be unjust or unreasonable. (*See, e.g., Moss v. Civil Aeronautics Board*, 521 F2d 298 (D.C. Cir. 1975))

APCC'S FACTUAL ARGUMENTS REGARDING UNDERCOMPENSATION FOR THE *EARLY PERIOD* AMOUNT TO SPECULATION

- ◆ speculation about the number and percentage of compensable calls;
- ◆ speculation regarding the ratio of interstate 800 calls to interstate access calls
- ◆ unsupported assumption of a linear rate of growth of the number of calls per payphone.

Thus, APCC provides no rational basis for exempting retroactive adjustments for the *Intermediate Period*.